made by a court of three judges—two of the full bench being absent. The rather summary manner in which the question was disposed of by the court does not favor the idea that it was fully discussed at bar or deliberately considered by the court.

In Vharton's Conflict of Laws, sec. 289, it is said: "But while a trustee, in order that equity may be done, will thus be ordered to make a sale in a foreign country, yet this sale is not regarded as a sale by the court, but a sale by the trustee, who proceeds according to the law of the *situs*. A direct jurisdiction over foreign immovables no court can assume. Thus a court of probate has no jurisdiction to direct an administrator to sell foreign real estate. Such real estate must be sold, if belonging to the decedent's estate, by order of a court of the *situs*. A deed not so executed is inoperative. *And a trustee appointed by the court of one State cannot pass title to real estate in another State.*" (Italicizing in the last sentence ours.)

The grounds upon which the constitutionality of the Act, drawn in question in the principal case, is sustained, apply with equal force to some other sections of the Code. Without specifying all, sec. 2460 seems to come directly and fully within the reasoning of the court in the principal case. It is well known to the profession that, previous to the Code of 1849, a creditor (with a few exceptions) could not go into a court of equity to set aside a fraudulent deed of his debtor and subject the property conveyed by it to his claim, until he had first established his claim by judgment or decree. See 2 Rob. Prac. (Old) at pp. 18, 19, and the cases there cited. The Code (1849) changed this rule of equity by allowing a creditor to institute a suit to set aside a fraudulent deed of his debtor before obtaining a judgment for his claim, and giving him, in case the deed be set aside, the same relief as if he had obtained judgment. Code of 1849, Ch. 179, sec. 2. This provision of the Code of 1849 was carried into sec. 2460 of the Code of 1887, and constitutes the first paragraph of that section. The variation in the language to a certain extent does not affect the question of validity. Section 2460 has now been extended so as to embrace debts "not due and payable." Acts 1893–94, p. 614. As to the reasons for enlarging the equity jurisdiction under what are now sections 2460 and 2562 of the Code, see Report of the Revisors of 1849 at pp. 641 (note †), 879 (note *).

CARTER BRAXTON, TRUSTEE, v. BELL AND OTHERS.*

Virginia Court of Appeals: At Richmond.

(November 21, 1895.)

1. CONTRACTS FOR SALE OF PERSONAL PROPERTY—*Recordation—notice.* Sections 2463, 2464 and 2465 of the Code do not authorize the recordation of any contract for the sale of personal property, except one made in consideration of marriage, and such recordation is not notice to a subsequent purchaser of such personal property for value and without notice.

*Reported by M. P. Burks, State Reporter.

2. CONTRACTS FOR SALE OF PERSONAL PROPERTY NOT IN EXISTENCE—*Legal title—Equitable ownership.* A contract for the sale of personal property not in existence does not operate to convey the legal title thereto when it is subsequently acquired. At law, it is not a valid assignment. In equity, it operates as an assignment and vests an equitable ownership which a court of equity will protect and maintain. In a contest, however, between such equitable claimant and a subsequent *bona fide* purchaser for value, holding the legal title, the latter must prevail. *First National Bank v. Turnbull*, 32 Gratt. 695, distinguished and *dictum* disapproved.

Appeal from a decree of the Circuit Court of Augusta county, pronounced June 2, 1894. *Reversed.*

This was a suit in chancery instituted in the Circuit Court of Augusta county by H. M. Bell against Carter Braxton, trustee, in a deed of trust made by Chichester & Stewart, and against the grantors in said deed, and the creditors therein secured. The complainant charged that on April 7, 1888, he had sold certain real estate, known as "Stribling Springs" property, to Chichester & Stewart, on credit; that the purchaser had agreed, amongst other things, to give a deed of trust, not only on said real estate, but on all the personal property they should thereafter place thereon, to secure the purchase price of said real estate; that the contract was in writing and duly recorded in the clerk's office of the County Court of Augusta county, on the third day of July, 1888; that he had conveyed said real estate to the purchasers, and they had executed a deed of trust thereon to secure the deferred payments of purchase money therefor, but that no deed of trust had ever been given on said personal property as required by the written contract of April 7, 1888; that, notwithstanding said contract, the said Chichester & Stewart, in fraud of complainant's rights, had, on the 13th day of November, 1893, executed and delivered to Carter Braxton, as trustee, a deed of trust on all of the personal property on said real estate, on which complainant claimed a lien as aforesaid to secure sundry enumerated creditors the amounts set forth in said deed; that the deed last mentioned had been duly recorded in said clerk's office; that the trustee had taken possession of said personal property and advertised the same for sale; and that "this sale is made without regard to the claim or lien of your orator, and without any recognition of his rights in the premises."

The grantors in the deed of trust, the trustee, and the creditors secured were made defendants, and the prayer of the bill was "that the said Carter Braxton, trustee, may be enjoined and restrained from dis-

posing of said property; that a receiver may be appointed to take charge of said property, with discretion to dispose of such of the same as is of a perishable character, holding the proceeds subject to the order of your Honor; that a decree may be entered establishing the lien of your orator on said property and for its sale for the satisfaction thereof, and that all such other, further and general relief may be granted to your orator as is suited to his cause, and as may be consistent with the rules of a court of equity."

The Circuit Court held that H. M. Bell, the complainant, had priority over Carter Braxton, trustee, and the creditors secured in the deed to him. From the decree Braxton, trustee, appealed.

The other facts sufficiently appear in the opinion of the court.

A. C. Braxton, for the appellants.

Patrick & Gordon and *R. P. Bell*, for the appellee.

RIELY, J., delivered the opinion of the court.

On April 7, 1888, as is evidenced by the contract of that date, H. M. Bell sold to Frank Chichester and Robert L. Stewart the real estate in Augusta county known as "Stribling Springs" for the sum of $15,000, to be paid in installments extending over several years, for which the vendees were to execute their bonds and secure them by a deed of trust on the real estate and also by a deed of trust on any personal property they might thereafter put on the premises. The contract of sale was acknowledged and admitted to record in the clerk's office of the County Court of Augusta county, on July 3, 1888. The vendor conveyed the land to the vendees by deed bearing the same date as the contract, but it was not acknowledged for record until October 3, 1888. A deed of trust to secure the bonds for the purchase money was given by the vendees on the land *only*, which likewise bears the same date as the contract, but it was not acknowledged for record until October 5, 1888. The vendees took possession of the land, and afterwards put on it a large amount of personal property that was needed to equip the place as a summer resort; but the deed of trust on such personal property to secure further the purchase money for the land, as contemplated by the contract of sale, was never made.

On November 13, 1893, Chichester and Stewart conveyed their personal property by deed to Carter Braxton in trust to secure their creditors other than Bell, which deed was duly acknowledged and admitted to record on the day of its date.

The controversy here is between the trustee, Braxton, and H. M. Bell, as to the right to the personal property. The former claims it as a *bona fide* purchaser for value without notice by virtue of the deed of trust conveying it to him, and the latter claims it under the agreement in the contract of sale of April 7, 1888, to give him a deed of trust on the personal property which they might thereafter put on the land as additional security for the purchase money.

It is settled by a number of decisions of this court, which are collated in the case of *Chapman v. Chapman et als.*, 1 Va. Law Reg. at p. 198; s. c. 21 S. E. Rep. 813, that a trustee in a deed of trust is, under our statutes, a purchaser for value.

It is not pretended that Braxton, the trustee, had actual notice of the agreement of Chichester and Stewart to give to Bell a deed of trust on the personal property as a further security for the purchase money for the "Springs" property; but it is claimed that the contract of sale having been recorded, he was affected with constructive notice of such agreement.

Many conveyances and other writings are required by the statute law of the State to be recorded. A list of many of them will be found in 2 Minor's Institutes, 850. The statutes which, it is claimed, apply to this case are secs. 2463, 2464 and 2465 of the Code. They are as follows:

"Sec. 2463. Every contract, not in writing, made in respect to real estate or goods and chattels, in consideration of marriage, or made for the conveyance or sale of real estate, for a term therein of more than five years, shall be void, both at law and in equity, as to purchasers for valuable consideration without notice and creditors."

"Sec. 2464. Any such contract, if in writing, shall, from the time it is duly admitted to record, be, as against creditors and purchasers, as valid as if the contract was a deed conveying the estate or interest embraced in the contract."

"Sec. 2465. Every such contract in writing, every deed conveying any such estate or term, and every deed of gift, or deed of trust, or mortgage, conveying real estate or goods and chattels, shall be void as to subsequent purchasers for valuable consideration without notice, and creditors, until and except from the time that it is duly admitted to record in the county or corporation wherein the property embraced in such contract or deed may be."

The writing of April 7, 1888, wherein is contained the agreement of Chichester and Stewart, and the recordation of which is relied on to affect the trustee, Braxton, with constructive notice, is not a deed, but simply an agreement or *contract to give a deed.* Not being a deed, but only a contract, the enquiry is, is a *contract* in regard to personal property embraced within the statutes quoted above and authorized to be

recorded. There is but one species of contract in regard to goods and chattels embraced within the provisions of sec. 2463, and that is a contract in consideration of marriage.

Sec. 2464 provides that "any such contract," that is, such contract as is described in the preceding section, and so far as goods and chattels are affected, a contract made in *consideration of marriage*, "if in writing, shall, from the time it is admitted to record, be, as against creditors and purchasers, as valid as if the contract was a deed conveying the estate or interest embraced in the contract."

And by sec. 2465 it is provided that "Every such contract in writing," that is, still, such contract as is described in sec. 2463, which, so far as it relates to goods and chattels, is, as we have seen, a contract made in consideration of marriage, and "every deed conveying any such estate or term, and every deed of gift, or deed of trust, etc., . . . shall be void as to subsequent purchasers for valuable consideration without notice, and creditors, until and except, &c." . . .

It is very plain from a perusal and comparison of these sections that there is but one species of contract in relation to personal property which is authorized to be recorded, and that is one made "in consideration of marriage." And such is not the character of the contract in question.

Our attention was particularly called by counsel of H. M. Bell to the case of *First National Bank of Alexandria v. Turnbull & Co.*, 32 Gratt., where, on page 705, Judge Anderson expresses the opinion that the contract out of which the litigation in that case grew was such an instrument as sec. 4, chap. 114, of the Code of 1873, which corresponds to sec. 2464, quoted above, of the Code of 1887, authorized to be recorded, and that its recordation was constructive notice to creditors and subsequent purchasers. The instrument there referred to by the learned Judge was a contract in regard to the purchase of cotton and the product to be manufactured from it. The decision in that case was eminently just and right. It was not, however, dependent in any manner upon the recordation of the contract, and the construction of the statute was not at all necessary to the decision of the case. What was said by Judge Anderson in that case was an *obiter dictum*, and should not control us in the decision of the case at bar, satisfied, as we are, that the statute does not embrace contracts in regard to goods and chattels, except contracts made in consideration of marriage. No one, we feel sure, would have been more ready to rectify the error that is apparent as to this matter in the opinion in the case referred

to than the lamented jurist who wrote the opinion, if his attention had been subsequently called to it, and an opportunity had been afforded him to do so.

Since the statute does not require a *contract* in regard to personal property, except a contract made in consideration of marriage, to be recorded, its recordation was a nullity and not notice to any one. It did not constitute constructive notice to the appellant. Where a writing which the law requires to be recorded in order to affect creditors and subsequent purchasers for value without actual notice is improperly recorded, either because it was not duly authenticated, or because of some other reason, even in that case its recordation is not notice. 2 Minor's Inst. 866–67; *Davis et als. v. Beazley et als.*, 75 Va. 491, and *Raines v. Walker*, 77 Va. 92. *A fortiori* must this be the case as to a writing, not required or authorized to be recorded, but which has been spread upon the record. Consequently the appellant was not affected with notice, actual or constructive, of the agreement by Chichester and Stewart to give H. M. Bell a deed of trust on the personal property which they might thereafter put on the real estate purchased of him.

If, then, the appellee, H. M. Bell, is entitled to the benefit of the said property, it must be by reason of the inherent strength of his claim. What is its nature? Is it legal or equitable? It is based, as we have seen, on an agreement to give a lien by deed of trust on personal property to be thereafter acquired. Such an agreement does not operate to transfer the legal title to the property when it is subsequently acquired. At law, it is not a valid assignment. It is merely an equitable right which a court of equity will enforce against the party contracting to give the lien, when he has acquired the property. "It is elementary," says Pomeroy in his Equity Jur., sec. 1288, "that a contract for the sale of chattels, which the vendor does not own, will not take effect upon the goods, when subsequently acquired, so as to pass a legal property in them to the purchaser, without some new act of the vendor after the property is acquired. The doctrine of equity is different. A sale, assignment, or mortgage, for a valuable consideration, of chattels or other personal property to be acquired at a future time, operates as an equitable assignment, and vests an equitable ownership of the articles, in the purchaser or mortgagee as soon as they are acquired by the vendor or mortgagor, without any further act on the part of either; and this ownership a court of equity will protect and maintain at the suit of the equitable assignee." The same principle applies equally to a deed of trust. If this *only* is the effect of a

mortgage or deed of trust actually executed, a mere agreement to give a deed of trust can be no greater. It is clear that the claim of Bell is wholly an equitable and not a legal right. Indeed his counsel did not claim it to be otherwise. The contest is narrowed down, then, to the simple question, whether the claimant of a prior equity or a *bona fide* purchaser for value without notice, who has thereby acquired the legal title, hath the better right to the property.

It is a general rule that where there are equal equities, the first in order of time shall prevail; that he who has the prior equity in point of time is entitled to the like priority in point of right. 2 Story's Eq. J., sec. 1502. Pomeroy in his Eq. J., sec. 414, states the rule as follows: "As between persons having only equitable interests, if their interests are *in all other respects equal*, priority in time gives the better equity." But this rule applies only between equitable claimants. Where the controversy is between the claimant of an equitable interest on the one side and a *bona fide* holder for value of the legal title without notice on the other, a different rule prevails.

Judge Christian, in his able opinion in the case of *Briscoe v. Ashby et als.*, in speaking of a purchaser for valuable consideration without notice, said: "No party can occupy a higher ground than that in a court of equity; and if he can maintain that position, his title is established and his position impregnable." 24 Gratt. 454, 473.

So, Mr. Pomeroy, in speaking of the defence of a *bona fide* purchaser without notice, says: "Where the defendant acquired the legal estate at the time and as a part of his original purchase, the fact of his purchase having been *bona fide* for value and without notice is a perfect defence in equity to any suit brought by the holder of a prior equitable estate, lien, encumbrance, or other interest, seeking either to establish and enforce his equitable estate, lien, or interest, or to obtain any other relief with respect thereto which can be given by a court of equity." 2 Pom. Eq., sec. 767. See also sec. 740.

The appellant, under the statutes of the State as expounded by this court, is, as we have seen, a purchaser for value. Being a *bona fide* purchaser for value without notice, his right to the property in dispute is therefore paramount.

In the case of the *First National Bank of Alexandria v. Turnbull & Co.*, *supra*, which was so much relied on by the counsel for H. M. Bell as an authority to control the decision of this case, the contest was not between a claimant of a mere prior equity and a *bona fide* purchaser for value without notice, as is the case here, but between a claimant

by equitable lien and an execution creditor. The principle involved in that case was, in this respect, wholly different from that which by an entire uniformity of decisions and text-writers controls this. As was said by Judge Burks in *Borst v. Nalle et als.*, 28 Gratt. 423, 433: "Authorities without number might be cited to show that, where statutory enactments do not interfere, the creditor can never get by his judgment more than his debtor owns, and to this he will be confined, as he should be, by a court of equity."

The decree of the Circuit Court, for the foregoing reasons, must be reversed and a proper decree entered in conformity with this opinion.

Reversed.

BY THE EDITOR.—It is very clear that the construction of the Code provisions by the court is right, and the *dictum* of Judge Anderson in *First National Bank etc. v. Turnbull* was erroneous and misleading, and, therefore, was properly disapproved.

The object of sec. 2463 of the Code (quoted in the opinion) was to change the law as declared in *Floyd v. Harding*, 28 Gratt. 401, and subsequent Virginia cases recognizing and following the same doctrine. The section is new and one of the most important sections of the Code. Hence, it is deemed appropriate here to call attention to a typographical error in the section as it stands, which, if unobserved, might lead to misconstruction. In the third line from the last in the section, in the phrase "*for* a term therein of more than five years," the word "for" should be "or." In the draft of the section by the Revisors it is "or," and it is "or" in the Code as reported and adopted by the Legislature, and as enrolled. We take it to be well settled that where there is a variance between a copy of a statute, though printed and published by authority, and the original statute as enrolled, the roll being a record of the highest character, is the best evidence of the law. See *Spangler v. Jacoby*, 14 Ill. 297; s. c. 58 Am. Dec. at p. 573 and cases there cited.

But if the language of the section as printed was, in the particular mentioned, the precise language of the Code as enrolled, it is believed that the construction would be the same. The context and sections of the Code *in pari materia* show that "or" was intended. Compare sec. 2413, "*or* for a term of more than five years," and sec. 2465, "such estate *or* term." The English Statute of Frauds *in temp.* Charles II., provided (among other things) that "no action shall be brought . . . upon any contract *or* the sale of real estate," *etc.* The uniform construction read "or" as "for." The re-enactment of that part of the statute in Virginia followed the construction substituting "for" for "or." See 1 Rev. Code of 1819, at p. 572; Code of 1849, ch. 143, sec. 1, sub. div. "sixthly;" Code of 1887, sec. 2840, sub. div. "sixth."

In *Hutchings v. Com. Bank of Danville*, 1 Va. Law Reg. 158, the court, by construction, very properly supplied the negative "not," inadvertently omitted by the Legislature in the statute construed.